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Supreme Court, U.S.
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No. 98-1331

In The

Supreme Court of the United States

ROBERT A. BIRD,

Petitioner,

v.

THE COMMONWEALTH OF KENTUCKY,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Kentucky

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioner Bird files this Reply Brief pursuant to Supreme Court Rule 15.6.

In its Brief in Opposition [hereafter Opp], the Commonwealth primarily argues the merits of this case. The Commonwealth's brief reinforces why certiorari should be granted. The Commonwealth concedes either directly or by implication the validity of the reasons for granting certiorari raised in Bird's Petition. The Commonwealth also provides additional reasons to grant Bird's Petition.

The Commonwealth concedes that "there is a split among the state courts concerning the proper interpretation of the *Kurth Ranch* decision." Opp at 14. As Bird pointed out in his Petition, the split is irreconcilable, widespread, and continuing. The Commonwealth's response is to argue that only one side of the split should be listened to. This is not an argument against granting certiorari, but rather an argument on the merits. Petitioner Bird believes that there is more validity to the arguments made on the other side of the split. Because the courts below are so hopelessly split, this Court should grant certiorari and allow both sides' positions to be developed in full.

The Commonwealth additionally requests that, if this Court grants certiorari, it should "limit[,] abrogate or overrule the *Kurth Ranch* double jeopardy analysis." Opp at 18. Inherent in the Commonwealth's request is the belief that there is potential tension in this Court's recent double jeopardy messages. Petitioner Bird believes that *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S.

767 (1994) can be read consistently with *United States v. Ursery*, 518 U.S. 267 (1996) and *Hudson v. United States*, 522 U.S. 93 (1997), without denigrating *Kurth Ranch* to a footnote case which applies only to never-again-to-be-duplicated facts. Bird opposes the Commonwealth's attempts to trivialize *Kurth Ranch*. The disagreement between the Commonwealth and Bird about how much of *Kurth Ranch* remains good law and how this Court's recent double jeopardy cases should be read together mirrors the split below on these issues. Certiorari should be granted to clarify the confusion.

The Commonwealth additionally confirms Bird's arguments that several issues of first impression regarding double jeopardy analysis should be addressed by this Court. The Commonwealth argues *Blockburger* issues, Opp at 16-17, and also suggests that order of proceedings makes a difference. *See* Opp at 3-4 and 17-18 (suggesting that a civil proceeding which does not involve loss of life or liberty is incapable of creating jeopardy which could bar a subsequent criminal prosecution, and attempting to distinguish *Kurth Ranch* as involving a situation where the criminal proceeding came first). The Commonwealth additionally raises another issue that should be ruled on by this Court – whether only the base tax rate may be considered for purposes of double jeopardy analysis when a penalty and tax are assessed together. *See* Opp at 3. While Bird believes that even the base rate alone would trigger double jeopardy protections in this case, Bird disagrees that this is the proper way to assess a penalty and tax which the statute authorizes as a package to be imposed on a person in connection with a single possession as a result of an arrest. In sum, Bird takes a position

opposite to the Commonwealth on all three of the issues mentioned in this paragraph, but agrees that these are all issues which this Court should resolve.

Finally, Bird believes the Commonwealth misunderstands the thrust of Bird's points about how Due Process or Excessive Fines arguments might properly enter into this case. Bird's position is that the Double Jeopardy clause, properly construed, requires reversal of the decision below. However, if Bird is wrong in this contention, Bird believes it would be appropriate for this Court to emphasize the reality or lack of reality of any alternative arguments that are available to persons who face the force of the state's punitive power in two separate proceedings. At the time the trial court ruled in Bird's favor, both *Halper* and *Kurth Ranch* were the controlling decisions. The trial court applied *Kurth Ranch* in straightforward fashion to prohibit the Commonwealth from prosecuting Mr. Bird. Neither *Ursery* nor *Hudson* had yet been decided. If the law has changed, or should change as a result of this Court's granting certiorari and rendering a decision on the merits in the instant case (for example if this Court should follow the Commonwealth's suggestion to overrule *Kurth Ranch*), such that there are no longer any double jeopardy protections for persons subjected to dual state punishments across civil and criminal proceedings, Bird would desire to raise in the trial court, after affirmance and eventual remand, any federal and state defenses which have become clear as a result of a changed double jeopardy landscape. This Court would not be asked to reverse the court below on grounds which were not argued to that court, but only to make clear to

the courts below what federal challenges might alternatively be considered.

CONCLUSION

For all the foregoing reasons, as well as for the reasons stated in the Petition for Certiorari, this Court should grant the petition for certiorari.

Respectfully submitted,

R. BURL MCCOY